Office-Supreme Court, U.S.
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NO. 80 - 1435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

VERSUS

JAMES O. GORMAN
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court possessed subject matter jurisdiction to consider an action by a discharged military exchange employee alleging a wrongful discharge.

CERTIFICATE OF INTERESTED PARTIES

The undersigned, attorneys of record for Respondent James O. Gorman, certify that the following listed parties have an interest in the outcome of this case:

PARTIES:

1. James O. Gorman, Respondent.
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   De Soto, Texas 75115

2. Army and Air Force
   Exchange Service Petitioner.
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The undersigned counsel certify that the following attorneys have an interest in the outcome of this case on behalf of their respective clients.

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By Edward B. Cloutman, III per a.s.
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OPINIONS BELOW

The opinion of the court of appeals (Petitioner's Appendix A, infra, 1a - 2a) is reported at 619 F. 2d 1114.

JURISDICTION

The judgment of the court of appeals (Petitioner's Appendix C) was entered on June 27, 1980. A petition for rehearing was denied on September 26, 1980 (Petitioner's Appendix D). On December 18, 1980, Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 23, 1981. Thereafter the Clerk of the Court extended the time for filing a brief in opposition to and including April 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. §1346 (a) (2) provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an excutive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with United States.

The Administration Procedure Act, 5 U.S.C. §702 (1976) provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action is a court of the United States seeking relief other than money damage and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United

States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Provided, That any mandatory or injunctive decree shall specify the Federal office or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. §1331(a) (1976) provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, an agency thereof, or any officer or employee thereof in his official capacity.

STATEMENT

Respondent Gorman was employed as a merchandising specialist with the AAFES in its executive management program. Respondent received final notice of separation and thereafter exhausted administrative appeal.

Respondent then commenced this action in the United States District Court for the Northern District of Texas, contending that his discharge was arbitrary, capricious and an abuse of agency discretion, not in accordance with AAFES personnel rules and regulations, not supported by substantial evidence, and that the discharge deprived Respondent of a property interest in his continued employment with AAFES without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Respondent sought reinstatement to his prior position with AAFES, back pay and all other rights and benefits of employment of which he had been unlawfully deprived, court costs and attorney's fees. The district court dismissed this action without an evidentiary hearing for lack of subject matter jurisdiction (Petitioner's App. B).

The Court of Appeals reversed (Petitioner's App. A) on the basis of its opinion in *Sheehan v. Army and Air Force Exchange Service*, 619 F. 2d 1132 (1980). The Court of Appeals held that the district court had subject matter jurisdiction under a confluence of 28 U.S.C.§1331(a), §1346 (a) (2) (1976) and 5 U.S.C.§702 (1976). Accordingly, the Court of Appeals reversed the judgment of the district court and remanded this action.

REASONS FOR DENYING THE PETITION

Petitioner Army and Air Force Exchange Service asserts that the decision of the Court of Appeals warrants review by this Court due to its "manifest error . . . and the significance

of the issue concerning the scope of federal court jurisdiction under the Tucker Act" (Petition for Writ, p. 5). Petitioner misinterprets the decision below since a careful analysis of the action of that Court shows it to be in accordance with the applicable caselaw of this Court including those cases which Petitioner cites as controlling, ***United States v. Hopkins***, 427 U.S. 123 (1976), and ***United States v. Testan***, 424 U.S. 392 (1976).

As the Court of Appeals carefully stated from the first sentence of its opinion in the instant case to the last sentence of its opinion in the companion case of ***Sheehan v. Army and Air Force Exchange Service***, 619 F. 2d 1132 (1980), "[t]he sole issue on this appeal is whether the district court possessed subject matter jurisdiction to consider an action alleging wrongful discharge" (Petition for Writ, App. A, p. 1a). "We travel no further and should not be understood to intimate any opinion on the merits", ***Sheehan, supra*** at 1141. The Court of Appeals correctly decided the jurisdictional issue and properly remanded this case to the district court for a decision on the merits. Such action is clearly in agreement with the direction of this Court. Only last year, in the analogous case of ***Hatzlachh Supply Co. v. United States***, 444 U.S. 460 (1980), this Court remanded that action because the Court of Claims [District Court herein] should first assess "whether there is an implied-in-fact contract of bailment upon which the United States is liable in the Court of Claims pursuant to its waiver of sovereign immunity contained in the Tucker Act", ***id***, 465. See also, ***United States v. Clark***, _____ U.S. _____, 63 L. Ed. 2d 171, 100 S. Ct. _____ (1980) (J. Rehnquist, dissenting).

Petitioner asserts that this Court's decision in ***Hopkins, supra***, is incompatible with the determination of the Court of Appeals that the district court had jurisdiction over Plaintiff Gorman's contract claims pursuant to the Tucker Act (Petition

for Certiorari, pp. 4-5, 8-9). To the contrary, *Hopkins* supports the Court of Appeals' finding of jurisdiction. In upholding the right of Hopkins, a discharged AAFES employee, to bring his action under the Tucker Act, 28 U.S.C. §1346, *et seq.*, this Court sets forth that such Act is applicable to any express or implied contract, including employment contracts. *Hopkins, supra*, at 126. As Petitioner failed to point out, this Court held that, "Plaintiff's allegation that his discharge constituted a breach of a contract of employment was sufficient, under the provisions of Pub. L. 91-350 [1970 amendments to Tucker Act, 28 U.S.C.A. §1346(a)(1)] to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction in the Court of Claims, and the judgment of the Court so holding is therefore affirmed", *Hopkins, supra*, at 130.

As in any breach of contract action, resolution of the further issues concerning the terms of such contract and the alleged breach of the contract by the Defendant await the trial on the merits in the district court. As stated by this Court in *Hopkins*, the issue of whether "Plaintiff held his position by virtue of an express or implied contract. . . depends upon an analysis of the statutes and regulations previously described *in light of whatever evidence is adduced on remand* as to Plaintiff's particular status in this case" (emphasis added) *supra*, at 129, 130.

No evidentiary hearing of any type has yet been held by the district court herein. The only facts pertinent to this petition are those raised by the pleadings below and these facts are sufficient to confer jurisdiction under the teachings of *Hopkins* set forth hereinabove.

Petitioner's reliance upon this Court's decision in *United States v. Testan*, 724 U.S. 392 (1976), is equally misplaced. *Testan* dealt with the claims of two civil service employees that their positions of employment were erroneously classi-

fied and that they were entitled to reclassification and back payment of the salary to which they deemed themselves entitled. This Court held that those employees failed to show any substantive right to such higher classification of employment. As this Court stated in discussing each of the various statutes put forth by the *Testan* employees as conferring substantive rights, "the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents do *not* rest their claims upon a *contract*" (emphasis added), *Testan, supra*, at 400.

Plaintiff herein, as one of several bases for relief, does rest his claim upon a contract: the contract of employment implied from the facts of the conduct of the parties herein in light of their surrounding circumstances. See *Porter v. United States*, 496 F. 2d 583, 590 (Ct. Cl. 1974), cert. denied 420 U.S. 1004 The validly enacted regulations of Petitioner AAFES pertaining to the dismissal of employees are part of that implied contract 1/ and the Tucker Act as well as the confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702 (1976) confers jurisdiction on the district court to enforce Plaintiff's rights under that implied-in-fact contract.

Further, one specie of the relief sought by Plaintiff herein, back pay for the unlawful termination of his federal employment (Petition for Writ, App. A, p. 2a), is directly analogous to "an action for back pay occasioned by a wrongful dismissal from the civil service" which the Court in *Eastport Steamship Corp. v. United States*, 372 F. 2d 1002, (Ct. Cl. 1967), cert. denied, 399 U. S. 911 (1970), cites as the type of case in which " 'a claimant who says he is entitled to money from the United

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1/ See *Aycock-Lindsey Corp. v. United States*, 171 F. 2d 518, 520-21 (5th Cir. 1948), cf. *Bodeck v. Department of Treasury*, 532 F. 2d 277, (2 Cir. 1976) cert. denied, 429 U. S. 849 (1976).

States because a statute or a regulation (or the Constitution) grants him that right, in terms or by implication, can properly come to the Court of Claims at least if his claim is not frivolous but arguable' *Ralston Steel Corp. v. United States*, 340 F. 2d 663, 667 (Ct. Cl. 1965) cert. denied 381 U.S. 950, 85 S. Ct. 1803, 14 L. Ed. 2d 723" *id*, at 1008. This Court in *Testan* cities *Eastport* as correctly setting forth "these established principles", *Testan, supra*, at 400.

The conclusion of this Court in *Testan* that "neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classification", 424 U.S. at 407, certainly does not lead to Petitioner's conclusion that Plaintiff herein cannot state a cause of action cognizable under the Tucker Act and under the jurisdictional grant of 28 U.S.C. §1331(a) (1976) coupled with the cause of action and waiver of sovereign action contained in the Administrative Procedures Act, 5 U.S.C. §701, *et seq.* See *Jaffee v. United States*, 592 F. 2d 712, 718-719 (3 Cir. 1979) cert. denied 441 U.S. 961 (1979). As this Court stated, "[t]here is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have, but was not appointed" *Testan, supra*, at 402. Plaintiff Gorman's situation is distinguishable in all respects, it being "one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. *United States v. Wickersham*, 201 U.S. 390 (1906)", *Testan* at 402. 2/

2/ In *Wickersham*, long before the passage of the Back Pay Act, 5 U.S.C. §5596, an appointed employee discharged counter to the requirements of an executive order was held to have a cause of action over which the Court of Claims had jurisdiction.

Further this Court, with the benefit of its prior decision within the same term in ***Testan***, granted certiorari in ***Hopkins*** for the express purpose of resolving the issue of whether a discharged AAFES employee could assert jurisdiction under the Tucker Act based upon an implied contract of employment. ***Hopkins, supra,*** at 124. As previously stated, this Court did find such jurisdiction in accordance with the principles set forth in ***Testan*** and the same statutes and regulations invovled in the instant case.

Petitioner also neglects to point out the vital fact that the Court of Appeals found that the district court had jurisdiction over Plaintiff's action not under just the Tucker Act, but rather under a confluence of 28 U.S.C. §1331(a), §1346(a) (2) (1976) and 5 U.S.C. §702 (1976) (Petition for Writ, App. A, p. 1a). Petitioner, of course, no longer questions the jurisdiction of the district court pursuant to 28 U.S.C.§1331(a) and 5 U.S.C. §702 (1976), but rather petitions this Court solely to review the issue of monetary relief under the Tucker Act.

The addition to the Administrative Procedures Act to which the Court of Appeals looked for jurisdiction and a waiver of sovereign immunity over certain of Plaintiff's claims, 5 U.S. C. §702 (1976), was enacted ***after*** this Court's decisions in both ***Hopkins*** and ***Testan***. That statute "is cast as a blanket waiver of sovereign immunity as to a broad category of actions against the government . . .", ***Hill v. United States,*** 571 F. 2d 1098 (9th Cir. 1978) and gives Plaintiff, in conjunction with the jurisdictional grants of 28 U.S.C. §1331(a) and 28 U.S.C. §1346(a), the right to maintain a cause of action in the district court to vindicate his substantive rights pursuant to his contract of employment, the applicable AAFES regulations, and the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. See ***Whiskers v. United States,*** 600 F. 2d 1332 (10 Cir. 1979) and ***Beller v. Middendorf***, 632 F. 2d 788 (9th Cir. 1980).

Further, since Plaintiff's claim also arises under the due process clause of the Constitution, a cause of action and damage remedy can be implied directly under the Constitution and the Fifth Amendment waives sovereign immunity. *Davis v. Passman*, 442 U.S. 228 (1979), *Carlson v. Green*, _____ U.S. _____, 64 L. Ed. 2d 15, 100 S. Ct. _____ (1980).

For the reasons set forth hereinabove, the district court properly has jurisdiction over Plaintiff's claims under several bases of jurisdiction and there is no error or conflict in the courts below which would warrant this petition for certiorari being granted.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent Gorman respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on the following counsel of record in this case at the addresses shown by placing same in the United States Mail, postage prepaid, on this the 23rd day of April, 1981:

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